SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 613

INLAND EMPIRE DISTRICT COUNCIL, LUMBER AND SAWMILL WORKERS UNION, LEWISTON, IDAHO; LOCAL 2679, LUMBER AND SAWMILL WORKERS UNION, BOVILL, IDAHO; LOCAL 2664, LUMBER AND SAWMILL WORKERS UNION, CLEARWATER, IDAHO; LOCAL 2766, LUMBER AND SAWMILL WORKERS UNION, POTLATCH, IDAHO; LOCAL 2684, LUMBER AND SAWMILL WORKERS UNION, LEWISTON, IDAHO; LOCAL 2923, LUMBER AND SAWMILL WORKERS UNION, COEUR D'ALENE, IDAHO; AND HARRY HAINES, POTLATCH, IDAHO, INDIVIDUALLY AND AS PRESIDENT OF INLAND EMPIRE DISTRICT COUNCIL,

Petitioners,

vs.

HARRY A. MILLIS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, GERALD D. REILLY, INDIVIDUALLY AND AS MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, AND JOHN M. HOUSTON, INDIVIDUALLY AND AS MEMBER OF THE NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF PETITIONERS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF PETITIONERS

Opinions of the Courts Below

The District Court for the District of Columbia, Honorable T. Alan Goldsborough, Judge, entertained the complaint of the petitioners seeking by virtue of the absence of

a fair hearing prior to the conduct of an election, to set aside an order of certification issued by the National Labor Relations Board and overruled the respondents' motion to dismiss. The District Court's unreported opinion was rendered April 5, 1944 and is found in R. 15, 16.

Following the rendition of the District Court's order the Board applied for and was granted an order allowing a special appeal to the United States Court of Appeals for the District of Columbia, pursuant to Title 17, Section 17-101 of the District of Columbia Code (R. 18). After considering briefs and hearing argument, the Court of Appeals in a divided opinion, Justices Edgerton and Miller for the majority, Chief Justice Groner dissenting, reversed the court below and directed dismissal of the petitioners' complaint in equity. The opinion of the Court of Appeals (majority and dissenting opinions) appear R. 20 and 21 and are reported 144 Fed. 2nd 539. Said decision was rendered July 24, 1944 and petitioners filed their petition for certiorari on October 19, 1944. Certiorari was granted by this court December 4, 1944.

Jurisdiction

Petitioners grounded their action below upon the original jurisdiction conferred upon Federal courts of controversies arising under the Constitution and laws of the United States (28 U. S. C. A. 41) (1) over all "suits and proceedings arising under any law regulating commerce" (Judicial Code, 24 (8); 28 U. S. C. A. Sec. 41 (8), and upon the jurisdiction with which courts of the United States are endowed under the terms of the Constitution itself, Article III, Sec. 2.

The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended; Supreme Court Rule 38, par. 5 (b) and 5 (c).

Statutes

The statutes invoked are the National Labor Relations Act, 29 U. S. C. A. 151, *et seq.*, especially 29 U. S. C. A., Sec. 159 (c). Pertinent sections are set out in Appendix A, together with applicable rules of the National Labor Relations Board governing its construction and application which, under recognized canons of construction, become incorporated as governing provisions of the law unless wholly inconsistent with statutory language.

Statement of the Case

This is a suit for equitable relief (mandatory injunction) from acts and orders of the National Labor Relations Board alleged to be in plain contravention of the Act of Congress creating the Board and charting its authority. The complaint is on behalf of five local unions, and Inland Empire District Council, an organization of numerous such local unions, all affiliated with the United Brotherhood of Carpenters and Joiners of America and the American Federation of Labor, and Harry Haines, individually and as president of said District Council. The membership of the five local unions involved are employees of Potlatch Forests Inc., a corporation engaged in the lumber and sawmill industry in the State of Idaho. Three of these local unions represent employees in the company's sawmills located at Lewiston, Coeur d'Alene and Potlatch, Idaho. The other two embrace employees in logging operations at Bovill and Headquarters, Idaho. These five labor unions had for years represented the employees of the company in these five operations.

The petitioners in their cause of action complain that the Board conducted a representation proceeding upon the petition of the Congress of Industrial Organizations (hereafter referred to as the CIO), ordered and held an election,

and certified the CIO as the collective bargaining representative, without according to these petitioners a hearing upon due notice, all of which is alleged to be in violation of the specific mandate of Congress in the National Labor Relations Act (29 U. S. C. A. Sec. 159 (c)), and in violation of the due process clause of the Constitution of the United States (Amendment V). (Par. 19, 20 and 26 of the Complaint, R. 5, 6 and 10).

Coupled with the cause of action for equitable relief is one for declaratory judgment declaring the proceedings of the Board in the absence of a hearing vouchsafed by statute and guaranteed by the Constitution ultra vires and void, and decreeing the Board's certification of the CIO based thereon invalid. Declaratory Judgments Act, 28 U. S. C. A., Sec. 400, Appendix B.

The complaint (R. 1) alleges that, in March 1943, three locals of the CIO filed with the Board petitions requesting certification as bargaining representative of the employees in three of the five operations of the company, contending that the employees of each of the three operations constituted separate and distinct appropriate bargaining units. A hearing on those three petitions was held by the Board at Lewiston, Idaho, May 14, 1943. The Board thereafter found the units sought in the petitions of the CIO inappropriate for the purpose of collective bargaining and dismissed the petitions.[1] Upon the dismissal thereof that particular proceeding was terminated.

Accepting such decision as final the CIO thereupon filed a new petition, seeking certification in a single unit alleged to include certain employees in all five of the company's operations, and a month later followed this with a motion requesting that the cases theretofore dismissed be reopened

[1] In the matter of Potlatch Forests, Inc., and I.W.A.-C. I. O., 51 N.L.R.B. 288.

and that their petition be treated as an amendment to the original petitions, and that an order be entered peremptorily by the Board directing the holding of an election without affording a hearing on the new petition (R. 4).

Thereupon the Board granted the motion of the CIO, over the objection of these petitioning AFL unions, and issued an order directing the holding of an election in a single unit composed of certain employees in all five plants of the company (including the two plants located at Potlatch and Coeur d'Alene, which were not included in the units sought by the CIO in its original petitions), all without affording a hearing or notice of hearing on the new issues involved.[2] The new issues included whether a question concerning representation had arisen since the dismissal of the former petitions, whether it should be resolved by an election, whether a determination was barred by a valid subsisting contract or for other reasons, and particularly the extent of the appropriate unit and the question of which classifications of employees should be permitted to vote in the election.[3] The last question was particularly important because some classes of employees were employed only at the Potlatch and Coeur d'Alene plants which were not involved in the first petitions. Other new and incidental questions included the date and places for the election, the payroll date to be used in determining eligibility to vote (which is particularly important where, as here, a large turnover is involved), whether a large number of employees absent in military service possessing employment status and seniority rights should be permitted to vote, and the form of the ballot. All these matters must be determined at or after a hearing but no hearing was allowed on this petition. The record made of the hearing of the former

[2] In the Matter of Potlatch Forests, Inc. and I.W.A.-C. I. O., 52 N.L.R.B. 1377.

[3] See Complaint, R. 7 and 8.

petitions involving different issues was necessarily wholly inadequate for the purpose, but nevertheless the Board arbitrarily determined the new issues without hearing or notice of hearing on the new petition.

The Board, without a hearing, determined which classifications of employees should be excluded from the election, as well as the other issues involved, with the result that the CIO secured a majority. Such majority, however, was less than 50% of the employees eligible to vote under the Board's order.

After the election and as a result of the continued protest of these petitioning AFL unions that a hearing and due process had been denied, the Board, on motion to reconsider and vacate its Decision and Direction of Election, granted a hearing but refused to vacate its Decision and Direction of Election. However, the hearing held after the election was manifestly insufficient especially since the extent of the unit and the employees eligible to vote must be determined before the election. Based upon the result of this election, the Board issued its orders certifying the CIO as collective bargaining representative.[4]

The complaint (R. 1) by appropriate allegations alleges this conduct and procedure to be arbitrary and capricious, specifically contrary to Sec. 9 (c) of the National Labor Relations Act, Sec. 3 of the Rules and Regulations of the Board, and violative of Amendment V of the Constitution. It spells out a clear trespass by the Board on the constitutional concept of due process, by pleading that no notice of the new issues was served on the parties concerned. No hearing on the issues was tendered to the parties affected, nor was a hearing on the issues so framed ever held.

Following the certification of the CIO as collective bargaining representative, petitioners filed their complaint in

[4] Potlatch Forests, Inc., 55 N.L.R.B. No. 44.

the District Court. The Board moved to dismiss which motion was overruled. The Board then appealed by special appeal to the Court of Appeals for the District of Columbia, which reversed the lower court and ordered a dismissal of the complaint. Your petitioners sought a review and reversal of that judgment and this Honorable Court granted certiorari December 4, 1944.

Specification of Errors

1. The Court of Appeals for the District of Columbia in its opinion by a divided court, erred in holding that the District Court has no jurisdiction of the present suit.

2. The Court of Appeals for the District of Columbia erred in reversing the ruling of the District Court and in ordering a dismissal of the complaint herein.

Question Presented

Does the United States District Court have jurisdiction to review a proceeding of the National Labor Relations Board, judicial or quasi judicial in nature, for the purpose of insuring those requisites of a fair hearing and of due process enjoined upon the Board by the statute creating it and by the Constitution alike, where the complaint sets forth an infringement of the statutory mandate of a fair hearing and a violation of the constitutional requirement of due process?

Summary of Argument

In brief petitioners do not contend that the court can assume the discretionary function of the Board to determine bargaining units or questions of representation. However, the Board in doing so must comply with the requirement of the statute and grant a fair hearing upon due notice consistent with the constitutional requirements of due process.

Inasmuch as the elections are resorted to for the specific purpose of determining the choice of representatives, such a hearing must be held prior to the election. This is logically necessary, because important functions of a hearing are to determine whether an election shall be held and what employees shall be permitted to participate in the election. Numerous other issues arising at the hearing must from the very nature of the proceeding be determined prior to the election. To refuse a hearing prior to the election, as was done in this case, is a denial of due process.

When a new petition or case is filed before the Board, the want of a hearing cannot be obviated by merely re-opening former cases involving different issues and adopting the record of the former hearing as a substitute for the hearing required by the statute and rules of the Board. There is no substitute for due process. Petitioners were entitled to a hearing because required by statute and because the Board by amendment changed the issues entirely, and decided the case on issues on which the respondents had received no hearing or notice of hearing. Such proceedings do not conform with the requirements of the Act or the Constitution as shown by the legislative history of the Act. When the Board acts beyond its authority and *ultra vires*, its actions are subject to restraint by a court of equity.

The Act is silent on the question of judicial review in representation cases, but the District Court had general equitable jurisdiction as held in *American Federation of Labor* v. *Madden*, 33 F. Supp. 943, a decision rendered after the case had been passed on by the Supreme Court of the United States and the Court of Appeals for the District of Columbia. The *Switchmen's* cases recently decided by the Supreme Court of the United States are to be distinguished, because a question of procedural due process is

involved here. Since the Board, according to the complaint (which must be accepted as true as to matters well pleaded), arbitrarily refused a hearing, rendered its decision, held an election and issued an order of certification in a manner violative of due process, such certification must be set aside.

The District Court correctly denied the motion to dismiss and affirmed jurisdiction under the general provisions of the Judicial Code. Because Congress in the National Labor Relations Act provided a special exclusive review of complaint cases does not warrant the conclusion that it thereby intended to exclude a right of review in representation cases. The care manifested in the Act to protect against abuse negatives any purpose to remove the right to a fair hearing from judicial protection. This right will be judicially protected when all remedies available before the Board have been exhausted.

While the respondents have a wide discretionary authority with which we do not here complain, they are, nevertheless, subject to the controlling supervision of the court where constitutional questions of due process are involved. Although respondents manifestly are possessed of a degree of expertness in the field committed to them, still the courts are possessed of superior competence to decide questions such as that presented here, and the courts will not abdicate the functions committed to them by a Democratic government.

The equity jurisdiction of the court provides the appropriate forum for the determination of the issues raised by the complaint.

Since the issues are within the competence of the court to decide, we submit the court should protect the petitioners from the unwarranted arbitrary and illegal actions of the respondents and reverse the lower court.

ARGUMENT

I

Introductory Statement

Throughout this litigation the Board has steadfastly resisted petitioner's efforts to obtain judicial review with respect to whether or not its procedure conformed with the command of Congress that an appropriate hearing be granted and complied with the constitutional requirement of due process. The Board adopts the position that Congress has, although not in terms, nevertheless *sub silentio*, withdrawn resort to the courts of the United States and has reposed conclusive finality upon any procedure that the Board elects to pursue.

The Board relies heavily on the fact that Congress provided an appellate review of complaint cases, charging unfair labor practices under Section 10 of the Act (29 U. S. C. A. 160), (modeled much in the pattern of the Federal Trade Commission Act) but omitted to establish such appellate procedure in representation cases under Section 9 (29 U. S. C. A. 159). It should be noted that the review provided in complaint cases is a special, expeditious and exclusive review in the United States Court of Appeals. The Board assumes that by not specifically providing for a review in representation cases, a conclusive Congressional intent to exclude resort to traditional equitable jurisdiction of courts of the United States, was evidenced, and that it was the purpose of Congress to repose finality in all the administrative acts and decisions of the Board in representation proceedings, even in matters relating to the solution of judicial questions of a constitutional nature.

The Board bases its argument upon the decision of this court in the *Switchmen's* and related cases,[5] and seeks to convert the fact finding finality accorded the National Mediation Board in that case into a finality equally as conclusive in favor of the National Labor Relations Board, even though failure to afford a fair hearing accorded by the statute and failure to conform to constitutional due process are involved. We submit that nothing in the decisions of this court precludes courts of the United States from exercising their paramount judicial prerogative over all matters arising under the Constitution and laws of the United States.

We freely concede that Congress has in many instances gone far, in some instances very far, to invest administrative bodies with sweeping and perhaps conclusive administrative and fact finding functions, but that does not for a moment militate against the right of the judiciary to continue to exercise its jurisdiction to review and to enforce statutory and constitutional rights and sanctions, such as those in issue under the pleadings in the instant case. Courts do not substitute their judgment, and we are not here asking the courts of the United States to do so, upon technical, scientific, factual and accounting matters, for that of the administrative specialists provided for that purpose. We merely urge—and that and nothing more is involved herein—that administrative bodies be limited to the extent only that they may be restrained from substituting their summary informal and executive judgment upon judicial, and particularly constitutional questions, for that of the members of the judiciary specially trained and selected for that particular function to whom the Constitution and Congress have specially committed the task.

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[5] *Switchmen's Union of N. A. v. N.M.B.*, 320 U. S. 297; *General Committee of Adjustment v. M.K.*, 320 U. S. 323; *General Committee of Adjustment v. S. P.*, 320 U. S. 338; *General Grievance Com. v. Genl. Com. of Ad.*

II

The Absence of Specific Provision for Review in the National Labor Relations Act Does Not Preclude Resort to Traditional Remedies for Relief in Equity.

This Court held in the case of *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, that the review provisions of the National Labor Relations Act did not encompass a representation case such as here presented. With respect to a proceeding involving only certification of collective bargaining representatives, Congress was silent in so far as review was concerned. Congress did provide for a judicial review of representation proceedings by petition to the Circuit Court of Appeals of the United States when an unfair labor practice order of the Board is based upon such certification proceeding, and the record of the investigation shall be included in the entire record in such cases (Sections 9(d), 10(e) and 10(f), National Labor Relations Act). This Court, however, rendered clear in that decision that the absence of specific statutory provisions for review does not necessarily preclude the applicability of traditional remedies for relief in equity, and the existence of such a remedy was adverted to by the Court of Appeals for the District of Columbia in that case. *American Federation of Labor* v. *National Labor Relations Board*, 103 Fed. (2) 933. This Court reserved decision thereon for some proper occasion, such as is presented by the record in this case, and indicated that a certification is a final order.

If the District Court does not have jurisdiction of the cause of action set forth in the complaint herein, then your petitioners are denied all right of appeal, and appeal is likewise denied in all representation cases in which the employer recognizes the validity of the certification of the

Board or in which the Board fails or refuses for any reason to prosecute the employer for unfair labor practices in refusing to bargain with the certified representative. The Board has full discretion to refuse to prosecute such a case. *Progressive Mine Workers* v. *National Labor Relations Board* (C. A., D. C. 1940), 3 Labor Cases 60,393; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 60 S. Ct. 561, 2 Labor Cases 29. Thus, if relief in equity in the District Court is denied, appeal in any representation case must depend upon whether or not the Board issues a complaint and prosecutes to conclusion the employer for refusal to bargain. To impute such an intent to Congress would be manifestly unwarranted.

The provision of the Act (Section 10(a)) relied upon by the court in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (a complaint case), giving exclusive jurisdiction to the Board, by its terms applies only to complaint cases in prosecutions for unfair labor practices before the Board. Hence, there is no statute or decision of this Court foreclosing the traditional remedy in equity in the District Court, and such a review cannot be denied by inference when generally afforded by constitutional and statutory provision.

The remedy where due process is involved is committed to the judiciary.

> "The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made, etc., * * *."
> (Constitution, Article III, Section 2.)

To the extent to which the Constitution in such respects may not have been deemed executory, Congress implemented the provisions thereof by passage of the Judiciary Act, an enactment of the Judicial Code endowing the courts

of the United States with the power to hear and determine all suits and controversies arising under the Constitution.

> "The District Court shall have original jurisdiction as follows: (1) of all suits of a civil nature at common law or in equity * * * where the matter in controversy (a) arises under the Constitution or laws of the United States." (Judicial Code, Sec. 24, 28 U. S. C. A., Sec. 41(1)).

Again:

> "of all suits and proceedings arising under any law regulating commerce." (28 U. S. C. A. 41(8)).

Conceding that Congress provided no judicial remedy within the Act for redress of a failure to grant a hearing conformable to the concept of due process, certainly it cannot be said that Congress thereby intended to withdraw judicial remedy. The power to do so is beyond the competence of Congress. The power to extend judicial protection stems directly from the Constitution itself. Congress may either expressly or *sub silentio* withdraw judicial review of an infinite variety of administrative procedures under this or any other act. It cannot, however, withdraw the power of the judiciary to enforce the constitutional sanction of a fair hearing or due process and this obviously for the reason that it is not competent thus to repeal or to rescind substantive provisions of the Constitution. In brief, the rule of the *Switchmen's* case and cognate cases may be taken to apply to procedural processes where the Board acts administratively in its legislative function, but can have no application wherever the Board is charged with infringing or encroaching upon basic constitutional rights. Such a construction would render the Act unconstitutional, and it is familiar law that the courts will impute no such intent to Congress. Hence, this Court will, we feel justified in submitting, indulge no intention on the part of Congress

to withdraw judicial protection for the enforcement of a fair hearing and of due process, no matter how much such an intent may have been implied where purely administrative and legislative procedures, such as those comprehended under the Railway Mediation Act and the *Switchmen's* cases, are concerned. We are confident that this Court will not read into the Act that which is not there, namely, the intendment to suppress the constitutional guarantee of judicial protection of due process. It would be intolerable to give high judicial sanction to a premise that Congress may freely withdraw resort to judicial review of a question which involves the essential requisites of due process or other constitutional guaranty.

For all purposes in this case, we may freely concede under principles elucidated in the *Switchmen's* and cognate cases hereinafter discussed that judicial review by Congress was totally withdrawn by the Railway Labor Act and analogous legislation as to all procedures purely legislative or administrative, particularly so where the agency involved proceeded within the scope of the authority committed to it by Congress. In such circumstances, Congress may properly evince an intent to invest exclusive procedural power over the subject matter in the agency in question and courts will properly respect such intent.

But this leaves unaffected and undisposed of the vital question not involved and presented in the *Switchmen's* and related cases, that is, the question whether Congress intended to suppress a judicial remedy and judicial relief for the protection of the constitutional grant of due process and of a fair hearing, and the further question with respect to whether or not Congress is competent to suppress such judicial remedy. The Court of Appeals, in the opinion of Justices Edgerton and Miller, felt compelled to disallow resort to judicial protection under the construction which it placed upon the *Switchmen's* and related cases. The

majority, in fact, conceived or at least expressed no distinction whatsoever between the power of Congress to suppress the remedy of judicial review of administrative acts and decisions within the *scope of authority committed to the administrative agency by Congress* and the power or want of power in Congress to suppress the remedy of judicial review *in matters relating solely to the constitutional right to a fair hearing and to due process.* This distinction, unappreciated by the majority, was clearly seized by Chief Justice Groner in his dissenting opinion when he expressed emphatic objection to the proposition implicit in the majority's opinion that federal courts, which derive jurisdiction from the Constitution itself, could ever be divested of the power to review and pass upon constitutional questions, such as the adequacy of a fair hearing or of due process.

Let us enumerate and in one or two instances briefly comment upon historic cases of this Court which preserve to the United States courts the province of confining administrative bodies within the statutory limit of their jurisdiction and authority:

Crowell v. *Benson*, 1932, 285 U. S. 22;
State Commission v. *Safety Gas Co.*, 290 U. S. 561;
Ohio Valley Water Co. v. *Ben Avon*, 253 U. S. 287;
Shields v. *Utah-Idaho Central R. R.*, 305 U. S. 177;
United States v. *Idaho*, 298 U. S. 105.

The case last cited involved an interesting question. A condition precedent to the exercise of jurisdiction by the Interstate Commerce Commission was whether the trackage in question came within or without an exception relating to a spur. Despite the I. C. C.'s holding to the contrary, an independent suit in equity before the District Court, wherein it was found to be included within the spur exception, was affirmed. We in our case likewise seek to determine whether the condition of a fair hearing commanded by

Congress was or was not complied with. The case likewise placed a very definite emphasis on the principle that fair hearing including notice and opportunity to meet issues, constituted the essential substance of due process.

United States v. *Abilene*, 265 U. S. 274:

> "Adversary proceedings are of a judicial nature and are governed by constitutional requirements of procedural due process. * * *."

Morgan v. *United States*, 298 U. S. 468 (1936) and 304 U. S. 1 (1938);
Ohio Bell Telephone v. *P. U. C.*, 301 U. S. 292;
St. Joseph's Stockyards v. *United States*, 298 U. S. 38.

There again, this Court announced the rule that courts of the United States may engage in an independent inquiry as to whether rights are confiscatory and violative of due process. United States courts are not bound by findings with respect thereto of an administrative body. Likewise, note its holding that a prerequisite to administrative finality of findings and procedure is compliance with due process and a fair hearing:

> "When the legislature appoints an agent to act within the sphere of legislative authority, it may endow the agent to make findings of fact which are conclusive; provided the requirements of due process * * * are met. * * * Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation." (*St. Joseph's Stockyards* v. *United States*, 298 U. S. 38.)

In the case of *Utah Fuel* v. *National Bit. Coal Com.*, 306 U. S. 56, this Court held with the District Court below that an independent suit in equity for relief would lie in the courts of the United States, although it affirmed the finding of the District Court that the Commission's procedure

was entirely pursuant to its statutory authority, and therefore dismissed the complaint, not because it did not state grounds for relief, but upon its merits. Warrant for the present action is clearly to be found in the language of the Court in that case:

> "Considering the circumstances here alleged, the great and obvious damage which might be suffered, the importance of the right asserted and the lack of any other remedy, we think complainants could properly ask relief in equity (p. 60)."

Kwok Jan Fat v. *White*, 253 U. S. 454. This case is representative of a long series of cases holding that alien Chinese are entitled to the essentials of a fair hearing even in such a summary matter as a deportation case.

C. M. & St. P. Ry. v. *Minnesota*, 134 U. S. 418, illustrating the principle that, where an agency's findings are nonreviewable by statute, the duty is all the more incumbent upon the courts to insure compliance with notice, hearing and due process. Cf. also an opinion by the late Justice Holmes in *Miller* v. *Horton*, 152 Mass. 540, 26 N. E. 100. Likewise, *Kuntz* v. *Sumption* (Ind.), 19 N. E. 474, at 477. Also cases discussed by the late Justice Brandeis requiring notice and hearing in I. C. C. cases in the decision of this Court in *Chicago Junction* cases, 264 U. S. 258, at 263-264; *Columbia Broadcasting Co.* v. *United States*, 316 U. S. 407.

III

Federal Courts Have Jurisdiction to Review Challenged Illegal Acts of Administrative Body

Never has Congress in any enactment explicitly granted even a conclusive *fact-finding* prerogative to an administrative agency without somewhere in the confines of the act evidencing its intent to condition such conclusiveness within the limits of the "substantial evidence rule." Findings of

fact and conclusions which fail to measure up to such a test —"which find no warrant in the record"—"which have no rational basis for decision"—have never been afforded immunity from jurisdictional review. Insofar as Congress has set up a special reviewing procedure for an administrative agency within the provisions of its governing act, it will be noted that with relation to practically every such agency Congress has never failed to incorporate therein the "substantial evidence requirement," thus permitting judicial intervention and review to set aside administrative decisions which fail to conform thereto.[6]

True, these are tests incorporated by Congress to govern and guide the courts in exercising appellate review where appellate review has been established, but they serve also as criteria evincing a congressional purpose to limit the exercise of administrative functions within legal bounds and within statutory authority, and to subject these agencies to judicial correction for arbitrary and illegal decisions and procedure. If such an intent be so clearly expressed where Congress has provided a review other and different than traditional power in equity, which but for such procedure would govern, certainly there is nothing from which we can conclude an intent on the part of Congress to grant a greater finality to administrative bodies in those instances where Congress omits to establish any new and different form of review. It may logically be assumed in the absence of affirmative evidence to the contrary that Congress intended

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[6] Cf. *I.C.C.* v. *Union Pac.*, 222 U. S. 541, 28 U.S.C.A. 14-48, Urgent Deficiencies Act; 15 U.S.C.A., Sec. 41, 45, Federal Trade Commission; 15 U.S.C.A., Sec. 77, Securities Act, 1933; 29 U. S. C. A., Sec. 210, Wages and Hours Act; 16 U.S.C.A., 825, 1(b), Federal Power Act; 15 U.S.C.A., Sec. 78(y), Securities Exchange Act, 1934; 33 U.S.C.A., Sec. 92(b), Harbor Workers Compensation Act, 1940; Note also several similar statutes establishing the prima facie evidence test, 45 U.S.C.A., Sec. 151, 153, Railway Labor Act; 7 U.S.C.A. 499 (c), Perishable Commodities Act; 7 U.S.C.A., Sec. 210, Packers and Stockyards Act.

the traditional exercise of equitable jurisdiction to correct illegal acts of administrative bodies to remain unimpaired except in those instances where it has provided otherwise, or where as in the *Switchmen's* case a clear congressional intent to confer administrative finality is discoverable. But again as we have contended elsewhere, we reiterate for the sake of clarity our position that nothing whatsoever in the *Switchmen's* case can justify the slightest inference or assumption that either Congress or this court would permit the agency there involved or any other agency to defy Congress, violate a congressional demand and to infringe a constitutional prerogative, and yet hide behind a cloak of judicial immunity. That case does not nor was it intended to extend beyond the factual content therein involved.

It is not without significance that the National Labor Relations Act itself contained a special procedure for review for complaint cases charging unfair labor practices under Section 10 (29 U. S. C. A. 160 (e)) which specifically prescribed the substantial evidence test as one necessary to be met in order to entitle the Board's decisions to conclusiveness. So far, therefore, as Congress has spoken on the subject and whenever it has done so it has consistently evinced an intent to safeguard against arbitrary and illegal action and an exercise of unconstitutional power. There is therefore no warrant for leaping to the conclusion that failure of Congress to implement the National Labor Relations Act with a special procedure for review of Section 9 cases, such as that provided for cases under Section 10, gives rise to an inference of congressional intent to suppress any and every mode of review whatsoever. Such an inference and conclusion does not follow from a plain construction of the decided cases of this court.

On the contrary, we need but to point out that the suppression of a traditional and pre-existing remedy for judicial protection from arbitrary administrative action will

never be presumed. If it is to be found at all, it is necessary that such suppression be derived from clear and affirmative evidence of a congressional purpose to do so. But more than that, in a case such as this involving a clear-cut issue over the denial of a constitutional right to a fair hearing, we are not warranted in trifling with inferences, presumptions or suppositions. We must chart our course by recurring to the Constitution itself and to the fundamental guarantee contained therein, preserving the right of the judiciary to enforce constitutional rights and sanctions.

As a matter, therefore, of sound and simple logic, it must be concluded that insofar as Congress provided no special mode of appellate review for Section 9 cases, it deliberately left unimpaired the power frequently and traditionally exercised by the federal judiciary to restrain illegal acts, and to do so particularly wherever such acts constitute an invasion of due process and a denial of a congressional demand for fair hearing. By omitting a provision for special mode of review, Congress *ipso facto* by necessary implication reads into the act those remedies traditionally available to afford protection against an unconstitutional and illegal assertion of power by an administrative agency.

Even in cases involving pensions, gratuities and compensation under statutes rendering the agency's decision final, the door has always been left open for judicial intervention in courts of equity to correct illegal administrative action or acts *ultra vires*. That is, reviewability in courts of equity has been maintained in those cases where administrative decisions are "wholly unsupported by the evidence or wholly dependent upon a question of law, or seem to be clearly arbitrary and capricious." See *Medbury* v. *U. S.*, 173 U. S. 492; *U. S.* v. *Laughlin*, 249 U. S. 440; *Silverschein* v. *U. S.*, 266 U. S. 221; *U. S.* v. *Williams*, 278 U. S. 255; cf. *U. S.* v. *Meadows*, 281 U. S. 271.

In those cases courts were dealing with statutes containing express language serving clearly to negative any

intent by Congress to permit judicial intervention. The statute in our case contains no express or affirmative language even so much as intimating such congressional intent, nor is there conversely language in the act serving to confer complete finality on the N. L. R. B. In fact it is not without significance, and perhaps of a great deal more importance than has hitherto been supposed, that the Act contains only one notable grant of exclusive power to the Board. That is the power under Section 10 to "prevent any person from engaging in any unfair labor practice * * *. This power shall be *exclusive*, * * *." 29 U. S. C. A. 160(a). Even as to this exclusive power, Congress provided a special statutory mode of review to insure judicial safeguards against illegal and arbitrary action. Is it not, therefore, incontestable that where Congress provided by statutory command that the Board should grant a hearing as a condition to the exercise of its power under Section 9 to investigate representation disputes, and to conduct elections, that it likewise intended to safeguard the grant of that high prerogative by implementing the power and the general jurisdiction of courts of equity to restrain administrative agencies from violating a statutory command, departing from its authority and infringing upon constitutional rights. This conclusion seems irresistible in the light of the caution which Congress manifested in Section 10 by subjecting its grant of exclusive power to judicial review as protection against illegal and arbitrary action.

IV

Jurisdiction in Equity Lies Where Administrative Action Is Directly Injurious to Legally Protected Interest of the Plaintiff.

In the recent much discussed case of *Employers Group Motor Freight Carriers* v. *National War Labor Board*, C. A., D. C., 143 Fed. 2d 145, Justice Edgerton indulged

in an interesting analysis of cases in which the Supreme Court has sustained suits not specifically authorized by statutes to annul or enjoin alleged illegal administrative action, and he classified them: (1) administrative action directly injurious to legally protected interests of the plaintiff, and (2) administrative action furnishing a basis for probable judicial proceedings against the plaintiff. (He adverted to a possible third classification involving review on general equitable principles of the administrative exercise of rule-making power.) It is certainly most clear that we complain of illegal administrative action on the part of the Board in refusing a hearing in a proceeding threatening to deprive petitioners of their existence and of their status as collective bargaining representatives, so that in no wise can it be doubted that we fall clearly within the ambit of this first classification and the cases cited therein.[7]

Our right to a fair hearing and to constitutional due process from an administrative agency, such as the N. L. R. B., involving a matter so vital to us as the terms of our collective bargaining status, is a justiciable personal right of a character and dignity, if anything, more important than pecuniary rights which this court held subject to vindication in courts of equity, even in the absence of a statutory provision for judicial review. In the important case of *Stark* v. *Wickard*, 88 L. Ed. 510 (Feb. 28, 1944), this court, speaking through Justice Reed, said:

> "It is only when a complainant possesses something more than a general interest in the proper execution of the laws that he is in a position to secure judicial intervention. His interest must rise to the dignity of an interest personal to him and not possessed by people generally. Such a claim is of that character which con-

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[7] *U. S.* v. *Lee*, 106 U. S. 196.
Waite v. *Macey*, 246 U. S. 606.
Am. School of Magnetic Healing v. *McAnnulty*, 187 U. S. 94.
Utah Fuel v. *Nat. Bit. Coal Com.*, 306 U. S. 56.

stitutionally permits adjudication by courts under their general power.

"We deem it clear that on the allegations of the complaint these producers have such a personal claim as justified judicial consideration. It is much more definite and personal than the right of complainants to judicial consideration of their objections to regulations which this court upheld in *Columbia System* v. *U. S.*, 316 U. S. 407. * * *

"To reach the dignity of a legal right in the strict sense, it must appear from the nature and character of the legislation that Congress intended to create a statutory privilege protected by judicial remedies."

And again:

"Without considering whether or not Congress could create such a definite personal statutory right in an individual against a fund handled by a federal agency, as we have here, and yet limit its enforcibility to administrative determination, despite the existence of federal courts of general jurisdiction established under Article III of the Constitution, the congressional grant of jurisdiction of this proceeding appears plain. There is no direct judicial review granted by this statute for these proceedings. The authority for a judicial examination of the validity of the secretary's act is found in the existence of courts and the intent of Congress as deduced from the statutes and precedents as hereinafter considered."

V

The Decision Below Misconceives the Scope and Purport of Decision in Switchmen's and Similar Cases and, Taking It From Its Context, Transposes It to Apply to Constitutional Questions of Due Process Not Involved Therein.

The *Switchmen's* case arising under the state of facts involved therein, as we have heretofore touched upon, is

no barrier to the exercise of equitable jurisdiction by the courts of the United States under the circumstances presented here.

The question for this Court's determination is whether the majority below was correct in its assumption that the *Switchmen's* and kindred cases were intended by this Court to constitute the Alpha and Omega of all law upon the subject of administrative agencies, such as the Railway Mediation Board and the N. L. R. B. If so, was the majority below justified in assuming that this Court in that decision intended to lay down the broad and universal proposition that the courts of the United States are powerless to intervene in equity to protect the enforcement of constitutional rights?. Is it necessary for the courts of the United States to conclude that that case was intended to announce a principle that action and decisions of administrative agencies, even on constitutional questions, so far supersedes the traditional remedies in equity provided by the judiciary act as to leave such constitutional rights wholly to the mercy of administrative bodies?.

It will be perceived that this presents another and a different question than that at issue or that decided in the *Switchmen's* and similar cases. That case did not require that its rule, however appropriate there, should be extended to cover all administrative decisions so as to render them forever final, irrevocable and non-reviewable even though they deal with constitutional questions. To enthrone administrative bodies with such a degree of administrative finality in judicial and administrative questions would be to confer upon them a revolutionary autonomy wholly out of place in our system of jurisprudence. It would be a step not in the slightest extent foreshadowed or suggested in the *Switchmen's* case. The distinction between the integrity of the judicial function so far as necessary to preserve and integrate constitutional privileges, rights and

sanctions on the one hand, and administrative function on the other, constitutes a sharp line of demarcation between the American democratic process and the continental system of executive absolutism.

Since, however, the Board at all times and the majority of the court below, in its divided opinion, rested their thesis throughout upon what they supposed to be the conclusion of the *Switchmen's* case, compelling the Federal judiciary to stand aside in the face of administrative decisions under any and all circumstances, let us then devote a brief examination to that case. Its factual content related, as did its companion cases, to jurisdictional disputes over claimed rights to represent employees of a railway. The undisputed province of the Board was that of designating the bargaining agency. So long as the Board discharges its statutory duty, employees were bound by its findings as to which organization represented a majority. The Board's acts *intra auctoritate* were final. In that case due process was admittedly afforded and the question present in ours was absent there. This Court held under such circumstances that the Board's discharge of its administrative function was non-reviewable, that it was intended to be so by Congress, and that the courts could not substitute their judgment for that of the Board. Similarly, we too may concede that had we received that notice and that hearing commanded by Congress, we likewise would be bound by the procedure of the Board and would have no complaint cognizable in the courts of the United States.

We, however, have a concrete, specific right to a hearing which was infringed and denied. The *Switchmen's* case did not purport to close the door to such circumstances. Justice Douglas, speaking for the court, recognized the power of the judiciary to vindicate rights of a fundamental character which otherwise would be obliterated.

Note the careful blueprint which he laid down in order to insure that no vital constitutional right should ever be sacrificed to a summary administrative process:

> "If the absence of jurisdiction of federal courts meant a sacrifice or obliteration of a right which Congress has created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control (cases) * * * In those cases it was apparent that but for the general jurisdiction of federal courts, there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act."

In a later case from this Court, that of *Stark* v. *Wickard*, 321 U. S. 288, a great deal of light was cast upon the operative scope of the *Switchmen's* decision. From a reading thereof, it is manifest, we submit, that this Court reiterates the propriety of extending judicial protection to all cases where, but for the jurisdiction and the relief available in Federal courts of equity, no means might otherwise be found for the enforcement of valuable granted rights. In that case where there was absent statutory scheme of review, this court none the less had no hesitancy in invoking a general equity power to restrain the Secretary of Agriculture from making certain deductions extrinsic to statutory authority.

Here too we have a right to notice and hearing founded on an express command of Congress. Note Justice Reed's language in *Stark* v. *Wickard* (pages 309-10):

> "When definite personal rights are granted by federal statute * * * the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to an aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction. When Congress passes an act empowering administrative agencies to carry on governmental

activities, the power of those agencies is circumscribed by the authority granted. This permits courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory authority in such instances is a judicial function entrusted to the courts by Congress by statutes establishing courts and marking their jurisdiction * * * Under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights, whether by unlawful action of private persons or by the assertion of unauthorized administrative power."

We are mindful of the decisions of the Court of Appeals, cited by the majority below as authority for its refusal to authorize intervention by a court of equity. That they are not applicable here, we think clearly appears from a reference to their facts and holdings.

We may conclude this discussion of the subject, therefore, by a reference to our constitutional and statutory right to notice and a fair hearing. This is a right which may not be trifled with by an administrative body, nor may such body whittle it away to suit its own pleasure or fiat.

It is a right possessing a definite connotation of judicial definitions, and the granting thereof is rendered a condition precedent by the command of Congress imposed upon the Board *in limine* before it may proceed with the exercise of its authority. By affording notice and hearing conformable to due process, the Board has undoubted authority to proceed and may invest itself with administrative finality. By failure thus to accord it, it does not bring itself within the principle of judicial immunity. We, therefore, clearly plead ourselves within every definition admitting judicial protection and relief laid down by this Court.

VI

Distinguishment of Cases Assumed by Court Below to Support Its Construction of Switchmen's Case

A majority of the Court of Appeals, in support of its decision, cited a number of cases as presumably authority for its view that the *Switchmen's* case required it to deny judicial intervention in our case, and in order to demonstrate the nonapplicability of those cases we shall briefly notice their facts and holdings.

First, was the *Order of Conductors of America* v. *National Mediation Board*, C. A., D. C., 141 Fed. 2d 366. The Court of Appeals in that case held the Board immune to judicial review under the rule of the *Switchmen's* case although it criticized the Board for failure to investigate charges of collusion between management and a labor organization, prior to an ordered election. The *ratio decidendi* proceeded upon the premise that the procedure of conducting elections was within the exclusive commitment of Congress. Confined to the fact of that case, we have no quarrel with it. There was no question of due process, fair hearing or constitutional law raised, discussed or decided.

Second, is the case of *Union Transport Service Employees of America* v. *National Mediation Board*, C. A. D. C., 141 Fed. 2d 724. The Board there proceeded to do only that which Congress confided exclusively to its processes, namely, to hold an election. The complaint lodged against the Board related purely to the mode of counting ballots. Though the District Court entertained jurisdiction, the Court of Appeals properly dismissed the complaint under the rule of the *Switchmen's* case. There again no constitutional question of fair hearing or due process was present. Hence the decision has no relevancy whatsoever to our inquiry.

Third, *National Federation of Railway Workers* v. *National Mediation Board*, C. A. D. C., 141 Fed. 2d 725. Again the Board held an election denying voting privileges to a certain group after affording the group a complete hearing. The group thereafter resorted to equity. The district Court dismissed its complaint, the Court of Appeals affirming. No conceivable question of constitutional law was there involved. The matters complained of were manifestly inherent in the investigatory process committed to the Board by Congress and merged in the discharge of its legislative function. The decision can have no bearing on the solution of our problem.

A case much in the mind of the court upon argument and referred to by the majority in its opinion was its own recent War Labor Board Decision: *Employers Group Motor Freight Carriers* v. *W. L. B.*, 143 Fed. 2d 145, Justice Edgerton writing the opinion for the court. That case arose under the jurisdiction of the War Labor Board and the authority of various executive orders and acts of Congress conditioning its processes and procedure. An agency of that Board following investigation and hearings established certain increased wage rates within the area concerned, which in effect were adopted by the Board. The industry complained of the Board's violation of its legal authority in that it erred in considering certain economic factors upon which it predicated its increases. It asserted that such rates, if paid by industry, would produce industrial "failure and dissolution."

The Court of Appeals expressed the opinion that the Board's acts were non-reviewable in the light of the legislative history disclosing a congressional purpose to remove WLB decisions from the periphery of judicial review. Having in mind the context of the Act and the purpose motivating the creation of the WLB, we entertain no

doubt of the propriety of that decision and particularly is this true when we examine the considerations set forth in the opinion in detail, which establish that no possible question of constitutional law was there involved. The court pointed out that none of the acts authorizing War Labor Board procedure conferred upon that Board any enforcement power whatsover. Its directives were "directory only, not mandatory" and "without legal sanction." Industry, therefore, being under no compulsion to pay increased rates was uninjured, unaggrieved.

Nor is there anything in the textual body of the court's discussion of the formula governing judicial review of administrative action, which conflicts with the principle of review which we here seek. Whether we plead (1) administrative action directly injurious to our legally protected interest, or (2) whether our case falls within the orbit of the second category of administrative action furnishing the basis for future judicial proceedings against the plaintiff, is a question unnecessary here to decide. Both grounds for judicial intervention to review administrative action proceed upon the basic proposition implicit in each that courts of the United States, under the command of the Constitution, do not lose power to enforce constitutional sanctions of due process where invasion of basic personal and property rights by administrative action is put in issue even though the governing statute provides no statutory appellate review.

From what we have said, it is therefore necessary to conclude that we in no wise seek to reopen questions put to rest in the *Switchmen's* case. We do not contend for the right of judicial review of administrative acts performed by the agency in furtherance of its congressional powers. What we do contend, however, is that the Board may not refuse us a hearing commanded by Congress, and then an-

swer our demand therefor with the defense that it may safely do so and leave us remediless by virtue of a presumed congressional intent to free the Board from judicial compulsion to obey the law. The Board cannot thus by its own *ipse dixit* place itself above the Congress which creates it. The express grant by Congress of the right to a fair hearing necessarily contradicts the Board's assumption—and the assumption indulged in its favor by the Court of Appeals—that Congress intended to leave the Board unrestrained by any judicial remedy requiring it to comply with law. Implicit in the grant is the correlative thereof of a purpose that the right thus expressly granted be implemented by adequate legal and judicial sanctions of enforcement.

VII

The Board Acted in Violation of the Statute Creating It and Charting Its Authority and in Contravention of the Constitutional Guarantee of Due Process.

Our complaint charges the Board with having failed to grant us a hearing. Whatever the Board's answer may be to this issue, upon its merits, is at this stage of the proceeding immaterial for the motion to dismiss upon the ground that the complaint fails to state a claim upon which relief could be granted, admits plaintiff's allegations and the question is squarely whether or not the Board is free to defy a Congressional command requiring it to grant a hearing upon notice to the parties involved. The statute provides (Sec. 9(c) Appendix A) as follows:

> Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In

> *any* such investigation, the Board shall provide for an *appropriate hearing upon due notice*, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives. (Italics supplied.)

Since it is the purpose of a hearing to determine among numerous other things the extent of the appropriate unit and the employees who will be permitted to participate in any election which may be held, it is obvious that the hearing required must precede the election. This view is supported by the history of the legislation. For example, it is stated on page 14 of the Report of the Committee on Education and Labor of the Senate (accompanying Senate Bill No. 1958, 74th Cong., 1st Sess., N. L. R. Act) that:

> Section 9(b) empowers the National Labor Relations Board to decide whether the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or other unit. Obviously, there can be no choice of representatives and no bargaining unless units for such purposes are first determined. And employees themselves cannot choose these units, because the units must be determined before it can be known what employees are eligible to participate in a choice of any kind.

Moreover, it is crystal clear that the appropriate hearing mandatorily required must be a due process hearing upon due notice affording the parties an opportunity to know the issues and meet opposing claims. That such was the intention of the Congress is clear from the legislative proceedings during the enactment of the law. Almost prophetically, it seems, and out of an abundance of caution, in the final stages of enactment the words "upon due notice" were inserted in Section 9(c) by the Conference Committee; as appears in the Report of Conference Committee

on Senate Bill No. 1958 (74th Cong., 1st Sess., p. 5) which reads:

> House amendment No. 12 inserts the phrase "upon due notice" in section 9(c) providing for hearings by the Board on the issue of collective bargaining representation. The conference agreement accepted this amendment out of abundant caution; though it would perhaps be implied that a requirement of a hearing includes due notice to the parties.

We contend that when the Board resorts to the election process to determine an issue of representation, it must hold a hearing prior to the election, else upon plainest principles of fair play and due process, the result of such election cannot be used as a reliable basis for certification. Not only the Act itself, but the Constitution, requires it. *Federal Administrative Law*, Vom Baur, Vol. 1, Sec. 290.

Since by the election the issue is generally decided for all practical purposes, a hearing after an election is insufficient. By the common practice of the Board, a full hearing upon due notice is held before an election with an opportunity for a supplementary hearing after the election at which questions of challenged ballots and violations of the rules of the election relating to campaigning in the vicinity of the polling place and like questions are normally considered. But in this case the Board refused a hearing prior to its Decision and Direction of Election and conducted the election without it.

The Board may not simply push aside interested parties and hold elections indiscriminately with the promise that a hearing will be held after the election to make sure that no interested party is injured. Such a hearing would not be "an appropriate hearing upon due notice" required by the Act. Not only would such a policy create unlimited confusion, but it would unavoidably and unfairly affect the rights of parties by reason of the announcement of elec-

tion results and the influence thereof in units which might be later found to be inappropriate. It would foster the holding of elections and stir up disputes where no question of representation had been found to exist. It would be the reverse of due process, and would destroy the usefulness of the Board itself by giving it authority to act arbitrarily without an opportunity to exercise discretion based on facts established by evidence.

Likewise the Rules and Regulations of the National Labor Relations Board (Appendix C) having the force and effect of law require the holding of a hearing in every case prior to the election, but the Board violated its own rules. If resort to judicial intervention be withdrawn, the Board in setting up its own procedure is judge not only in administrative and legislative functions which it may discharge, but of constitutional questions involved in its procedure. To that extent it may suppress Congressional requirements and to all prayers for relief it need answer only with judicial immunity. This Honorable Court does not sanction any principle which will permit agencies created by Congress to destroy the laws provided for their government.

It requires no extensive citations of authorities to illustrate how cogent and controlling is the construction which the Board itself has put upon its own governing act. See *Dismuke* v. *U. S.*, 297 U. S. 167, stressing the weight and persuasiveness accorded the construction placed upon duties of an administrative agency through the medium of its own rules and regulations; *Edwards Lessess* v. *Darby*, 12 Wheat (U. S.) 206; *U. S.* v. *Alabama G. So. Ry.*, 142 U. S. 615; *Fawcus Machy Co.* v. *U. S.*, 28 U. S. 375; *Norwegian Nitrogen Co.* v. *U. S.*, 288 U. S. 294.

In its brief in opposition to the petition for writ of certiorari, pages 9 and 10, the Board cites a number of cases holding that a hearing need not be held at any particular time in order to fulfill the requirements of due

process. The ruling of these cases, however, is not applicable to the circumstances present here.

These cases with which we have no quarrel relate in most instances to tax statutes. They held constitutional statutes which permit an advisory or preliminary investigation of tax or other liability by an agency of the state, provided that before fixed liability be established, process, notice and full hearing of a judicial character be afforded. Each of these cases involves a statutory scheme permitting a judicial review upon notice and full opportunity to all parties to be heard with respect to the action of some administrative subordinate of the state—a review not available here under Section 9 of the National Labor Relations Act.

Opp v. *Administrator of Hours and Wages*, 312 U. S. 126, much relied upon by the Board throughout these proceedings, is merely an analogous case holding that an industry committee, empowered under the Act to conduct an investigation and make recommendatory reports to the Administrator, does not violate due process where no notice of hearing is afforded by the Committee since the Act provides for a full hearing upon notice to all parties before the Administrator. There the aggrieved party actually appeared and participated at such hearing before the Administrator issued a decision establishing and affecting the rights of the parties. The decision of the Board in our case ordering the conduct of an election, and the actual conducting of an election, was no mere act of an advisory committee. It was an official decision of the Board, which the Board was empowered to make only after service of notice to all affected parties, apprising them of the contents of the petition and the holding of a hearing. Whether an election be held at all or not, or whether it was barred by our contract, who should participate therein and who should be excluded therefrom—these and many others were all issues determinable only after notice or hearing.

It is no answer to say that the Board is free to determine these vital issues without notice or hearing, and then months after grant us a hearing *ex post facto*, after the prejudice occurred and the harm is done. An *ex post facto* hearing is not judicial. It is not what the statute commands. It is not an "appropriate hearing." It is not due process nor does anything in the *Opp* case intimate so. The Board's position would have a certain degree of persuasiveness entirely lacking here had it in fairness, in accordance with judicial procedure, first vacated its order and decision, something which it steadfastly, however, has refused to do. Clinging, therefore, at all times to its decision and order requiring an election, without granting us notice or hearing, it is nothing more than an empty formality to extend to us an *ex post facto* hearing.

In the *Opp* case, it will be noted that before the Administrator acted he gave full notice and granted a complete and formal hearing. In our case the Board decided first to hold an election without notice or hearing, and then belatedly sought to grant us a *nunc pro tunc* substitute therefor. *But there is no substitute for due process.*

The Board in fact treats the manner in which it trifled with the congressional mandate of notice and fair hearing as a mere detail falling within the realm of the doctrine of "*de minimis.*" In its view these are merely empty formalities and minor flaws readily curable by certain ingenious *nunc pro tunc* procedures. It treats it as a mere matter of a clerical omission subject to a subsequent corrective order *nunc pro tunc* entered for the purpose merely of revising the record in order to bring it current and up to date as to adjective or procedural requirements. But the matter here involved is far beyond the confines of the *nunc pro tunc* doctrine.

A procedure of the Board which denies petitioners the essential elements of fairness and the resulting decision is

not merely infected with slight flaws or curable infirmities, but is void in its entirety.[8]

We do regard it as worthwhile to point out that the Board, despite an express disclaimer thereof, nevertheless impliedly by its plea that its procedure is adequate, confesses the power and jurisdiction of the courts of the United States to weigh, consider and determine the effect thereof and to pronounce it invalid if found inadequate, and valid if found sufficient to conform to due process. But it must moreover be noted that in doing so the Board goes further and asks this court to sit as a court of original *nisi prius* jurisdiction to decide the issue in lieu of having it heard upon its merits in courts of original instance where under the Constitution and the judiciary act pursuant thereto jurisdiction thereof is vested.

The writ of certiorari to the Court of Appeals below brings up to this court for decision only one question: Whether or not, as we contend, that court erred in holding that courts of the United States possess no power or jurisdiction to inquire into the sufficiency or insufficiency of the Board's procedure in order to ascertain judicially whether the congressional mandate of a fair hearing and the constitutional requirement of due process have been complied with.

In the case of *A. F. L.* v. *Madden*, 33 Fed. Supp. 943 (U. S. D. C., D. C.), the final chapter in the litigation involved in *A. F. L.* v. *N. L. R. B.*, *supra*, the District Courts assumed jurisdiction. In *Klein* v. *Herrick*, 41 Fed. Supp. 417, and *International Brotherhood of Electrical Workers* v. *N. L. R. B.* 41 Fed. Supp. 57, the District Court also assumed jurisdiction. See also *Inland Empire District*

[8] See New England Division Case, 261 U. S. 184; *Lloyds' Societe* v. *Elting*, 287 U. S. 329; *Saltzman* v. *Stromberg-Carlson*, 46 Fed. 2d 612; *N.L.R.B.* v. *Consolidated Edison*, 305 U. S. 197; *N.L.R.B.* v. *Cowell Portland Cement Co* (9 C.C.A.), 108 Fed. 2d 198; *National Broadcast* v. *F.C.C.* C.A.D.C. (1942), 132 Fed. 2d 545.

Council v. *Graham*, 53 Fed. Supp. 369 in support of the same rule. In the present case petitioners have exhausted all remedies before the Board and the Board's decision and certification are final unless the jurisdiction of the District Court is recognized.

Conclusion.

Courts of the United States have ever been most jealous of preserving a fair opportunity to be heard, wherever by due process or statute it is required. In times past, historic decisions have so clearly defined the essentials of a fair hearing that one should scarcely expect today to see them called in question. Today it is true that an ever-increasing amplitude and degree of autonomy are being extended to administrative bodies to the end that governmental efficiency may not be harassed and embarrassed by interminable and litigious delays. Yet the greater the finality and conclusiveness of the administrative prerogative, correspondingly the greater must be the responsibility of the judiciary to exact a full measure of conformity with principles of fair and just treatment and with due process at the hands of these powerful agencies. Only by doing so may the American process be safeguarded.

We, therefore, contend for the reasons above set forth that the judgment of the United States Court of Appeals for the District of Columbia should be reversed and the cause sent back to the Trial Court for hearing and disposition on its merits.

Respectfully submitted,

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APPENDIX A

Statutes Involved

The pertinent provisions of the National Labor Relations Act (49 Stat. 449; 29 U. S. C., Sec. 151 et seq.) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

* * * * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

Representatives and Elections

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Prevention of Unfair Labor Practices

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not

less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such a person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and

shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States and upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any Circuit Court of Appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

APPENDIX B

The pertinent provisions of the Federal Declaratory Judgments Act (48 Stat. 955, as amended by 49 Stat. 1027; 28 U. S. C., Sec. 400) are as follows:

> (1) In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

APPENDIX C

The pertinent provisions of Rules and Regulations of the National Labor Relations Board, Article III, Sections 3, 8 and 9 (Eighth Annual Report of the N. L. R. B., pages 223 and 225) are as follows:

SEC. 3. *Same; investigation by Regional Director; definition of parties; notice of hearing; service of notice.*—After a petition has been filed, if it appears to the Regional Director that an investigation should be instituted he shall institute such investigation by issuing a notice of hearing, provided that the Regional Director shall not institute an investigation on a petition filed by an employer unless it appears to the Regional Director that two or more labor organizations have presented to the employer conflicting claims that each represents a majority of the employees in the bargaining unit or units claimed to be appropriate. The Regional Director shall prepare and cause to be served upon the petitioners and upon the employer or employers involved (all of whom are hereinafter referred to as "the parties"), and upon any known individuals or labor organizations purporting to act as representatives of any em-

ployees directly affected by such investigation, a notice of hearing upon the question of representation before a trial examiner at a time and place fixed therein, provided that when the petition is filed by an employer the Regional Director shall serve the notice of hearing on the employer petitioner and on the labor organizations named in the petition (all of whom are hereinafter referred to as "the parties"), and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation. A copy of the petition shall be served with such notice of hearing.

* * * * * * *

SEC. 8. *Record; what constitutes; transmission to Board.*—Upon the close of the hearing the Regional Director shall forward to the Board in Washington, D. C., the petition, notice of hearing, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, all of which shall constitute the record in the proceeding.

SEC. 9. *Proceeding before Board; briefs; further hearing; direction of election; certification of representatives.*—The Board shall thereupon proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or after further hearing, as it may determine, to direct a secret ballot of the employees in order to complete the investigation, or to certify to the parties the name or names of the representatives that have been designated or selected, or to make other disposition of the matter. Should any party desire to file a brief with the Board, the original and three copies thereof shall be filed with the Board at Washington, D. C., within seven days after the close of the hearing. Immediately upon such filing, the party filing the same shall serve a copy thereof upon each of the other parties.